UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 13 CR 30 (JSR)

JUAN PERALTA,

Defendant.

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New York, N.Y.
May 23, 2014
2:26 p.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
AMIE N. ELY
EMIL BOVE
Assistant United States Attorneys

LAW OFFICE OF ADAM D. PERLMUTTER P.C.
Attorneys for Defendant
ADAM D. PERLMUTTER
DANIEL McGUINNESS

ALSO PRESENT: NICHOLAS LUTTINGER, Spanish Interpreter

(In open court; case called)

MS. ELY: Good afternoon your Honor Amie Ely and Emil Bove for the government.

THE COURT: Good afternoon.

MR. PERLMUTTER: Good afternoon. For defendant Juan Peralta, I'm Adam Perlmutter; my associate, Daniel McGuinness; and my client to my right.

THE COURT: All right. We're here for sentencing but there are many questions that have to be reached before the Court can even begin to arrive at a determination.

Under the law of the United States as interpreted by the Supreme Court and the Second Circuit the Court is ordinarily required to first calculate the sentencing guideline range.

This Court is on record as indicating its view that the sentencing guidelines, aside from their innumerable material flaws, irrationalities and absurdities, are in many cases of only the most modest use, if at all, in determining an appropriate sentence. And in this particular case where the defense and the government radically disagree on how the guidelines should be interpreted in ways that would make a very material difference as to the guideline range, the Court's views of the worthlessness of calculating the guideline range would be reinforced. However, I don't make the law. And my betters on the Supreme Court and the Second Circuit have

instructed me to calculate the guideline range.

What makes it all the more a waste of time in this Court's view is that the difference between the government's view and the defendant's view, the probation office having agreed with the defendant, is one that relates to technical issues about guideline interpretation, having almost nothing to do with the underlying facts of the case. From a purely technical standpoint, there's some pretty interesting questions, roughly equivalent to the medieval philosophers' debates over how much angels could dance on the head of a pin and having similar practical importance; that is to say, none.

But that's problem number one. Problem number two, and to my mind a far more important problem, is that it does not appear that the parties agree on a whole host of material facts. And while that disagreement was irrelevant when it came to entry of a guilty plea, the disagreement is highly relevant to determining the appropriate sentence.

Long before the guidelines came into existence a gentleman by the name of Benjamin Cardozo who was, among other accomplishments, probably among the two or three greatest judges of the 20th century, said, "The facts drive the law." And this is a good example. If I knew what the facts were, I would know how best to resolve the differences among the parties as to the guideline range but, much more importantly, I would know what sentence to impose.

If the government is correct about the facts, there is no way I would adopt the probation recommendation of time served. If the defense is right about the facts, that recommendation would be considerably more colorable. And these facts relate not only to the offense in question but to the defendant's activity both before and after the offense, even to questions like what are conditions at the MCC. For example, taking that last one as an example, the defense argues that because the defendant has served or been detained for something like 13-and-a-half months in the local federal jails, he should receive -- there should be a downward adjustment to take account of the "harsh conditions therein." Well I don't know whether their conditions there are harsh or not, but we could find out. We would have to hold a hearing, an evidentiary hearing.

So, let me make sure that I do understand at least some of the areas where there is disagreement. The government asserts, for example, that the defendant had previously worked as a debt collector for a drug trafficker. If that's true, of course it casts a whole different light on how much he understood of what, for example, both he was saying and what Encarnacion was saying and what was going on, etc. But, I don't understand the defense to be agreeing with that accusation. But let me find out.

Are you agreeing or disagreeing with that accusation?

MR. PERLMUTTER: No, your Honor. We are obviously disagreeing with it. My understanding is that it comes from cooperating witnesses -- my understanding is that it comes from a cooperating witness working with the government. I don't know if it's more than one, but I understand it's one.

THE COURT: Now let me ask the government counsel if one were to hold a Fatico hearing are you prepared to present evidence to that effect?

MS. ELY: Your Honor, could we have a moment?

THE COURT: Yes.

(Pause)

MS. ELY: Your Honor, our proof would include both what cooperating witnesses would say about statements that Peralta made to them and statements that Peralta made to agents. He's actually spoken with agents in the past, including October 21, 2011, during which he said that he had been involved in home invasions. And he engaged in a proffer session with the government in December of 2011 during which he made other admissions that we believe defense counsel's denial of this aspect of the government's proof has now opened.

THE COURT: Well, I don't know that he's opened anything necessarily in a binding way. He was just responding to my question of whether he admitted or denied this particular allegation.

But what you're saying is that if there were a Fatico

hearing you would be prepared to adduce testimony both from his proffer session and from a cooperator.

MS. ELY: Yes, your Honor. The cooperator is not housed in the New York City area so we would -- it would require some advance notice.

THE COURT: I'm not talking about this afternoon, obviously.

So, I'll just stop there. I have a whole laundry list of these things that I was going to go through but that one, I just picked that one because it does totally color the way I would interpret what went on here.

The government's view in essence was that in this role of an impersonator, which was the offense to which he pled, he undertook -- either individually or with the help of or in league with Encarnacion -- a long series of threatening activities that were designed to place the person to whom -- persons to whom those statements were made in very severe fear.

I might add for the record I received earlier today a victim impact statement from one of the victims.

On the other hand, if that allegation is not true or is substantially exaggerated, then the activities that Mr. Peralta undertook are diminished, particularly with respect to his knowledge and intent which are key elements in the Court's determination of the appropriate sentence.

So, I thought about the classic sort of Solomonic

approach here of saying well giving some weight to the government's allegations but not taking them at a full face value in all respects and, forgetting about the very difficult but interesting guideline calculation issue, I could impose a sentence here of say two years. And then when I thought about that, I thought no, that's a total derogation of my duty. If this guy's as bad as the government says he is, that's too minimal of a sentencing. If he is as hopeful and peripheral as the defense alleges, then it might be too harsh a sentence. I don't think I should just speculate and, on that basis, give a compromise. So all of this is by way of saying that -- and we've already reached a similar conclusion in Encarnacion. I was hoping to avoid it here but I don't know that I can. We need to have a Fatico hearing.

Now, let me ask two other questions. First, is the government contesting the notion that the MCC or MDC are harsh in a way that would permit a reduction in sentence for which the standard is considerably high, or are you simply taking the position that even in taking every allegation that's made about that on its face, for the purpose of argument, you still don't think it warrants under the law a reduction? Of course the law here has two aspects. There's guideline aspect but there's also the aspect of what this Court in its discretion feels the impact is on the broader 3553(a) factors.

MS. ELY: Your Honor, one moment?

THE COURT: Yes.

(Pause)

MS. ELY: Your Honor, as an initial matter we don't believe that the defendant has shown, even if you take at face value his allegations, that he's entitled to such reduction.

As to whether the government would be prepared to prove up what the circumstances of the general conditions of confinement are at the MCC and MDC we would like an opportunity to check with our office to find out if that's something --

THE COURT: I can well understand that. I don't imagine that would take us though more than three or four weeks.

Now, it occurred to me -- we already have a evidentiary hearing set. Would the witnesses on the points raised in the parties' papers here, would the government's witnesses be essentially the same people?

MS. ELY: In many respects, your Honor.

What we would propose, and we would need to obviously talk with Mr. Cohen, who is represented by his students today but not present himself.

THE COURT: Wait a minute. Only two students, three students? It's really a small fraction of the normal contingent.

MR. PERLMUTTER: Judge on behalf of Mr. Cohen we don't take umbrage by the showing today.

MS. ELY: Here's what we would propose, that we go forward on Tuesday with Dr. Goldstein's testimony and also with the testimony of Mr. Encarnacion's ex-wife. Because we don't believe that those aspects of that hearing, as planned, implicate Mr. Peralta's interests.

We would like to, however, put off the rest of the Fatico hearing because we think that it would be inefficient and also unduly burdensome to these victim witnesses to have to testify twice in this matter.

THE COURT: It's Wednesday is what my --

MS. ELY: It is Wednesday.

THE COURT: I assume you're talking the holiday off, not that the court will, of course.

So, that's fine with me if it's fine with not only present counsel but also Mr. Cohen as well. And obviously we can't put it off long but we have to put it off long enough for defense counsel in this case to be able to prepare adequately.

Do you have a ballpark date in mind?

MR. PERLMUTTER: Judge, can I just ask a quick question so that we can frame the issues. You've raised this one issue about debt collection saying that that would certainly --

THE COURT: Let me give you an idea of some other issues.

MR. PERLMUTTER: I think that that might help us.

THE COURT: This is without prejudice to the hearing considering other issues that the parties have indicated by their submissions they are in disagreement with.

There's the question of whether Mr. Peralta knew that Mr. Encarnacion had used Facebook messages to threaten victim one's family.

There's the question of whether Mr. Peralta accompanied Encarnacion to victim one's mother's house in Brooklyn and heard Encarnacion tell her, if he did, that her son would not be safe unless he paid Encarnacion the money that the son allegedly owed.

There was a period, I believe the government says it's about six weeks, in which Mr. Peralta allegedly engaged in multiple telephone calls with victim one during which he allegedly threatened the safety of victim one and victim one's family.

Within that, there is a question of whether he intended and gave a threatening meaning, or intended to give a threatening meaning to some statements that otherwise might be viewed as ambiguous.

So, I will give one example. The government cites where he says, "We're not kids. I hope that God willing you will be able to solve it because we're ready for war. I don't want your family having to do with this."

Now if you take that statement on its face literally,

it has one meaning. If you take it as an implied threat, an intentionally implied threat, it has another meaning; so, that's the kind of thing.

MR. PERLMUTTER: My only question about that point, Judge, is that my understanding of the law is that the intent of the speaker is not what controls. It's the subjective impression of the listener as to whether they feel threatened by it.

THE COURT: I think that for sentencing purposes it's just the other way around.

MR. PERLMUTTER: You're right. I'm thinking in terms of the charge.

THE COURT: But for sentencing purposes what the court is looking at is was this a bad guy who set out to threaten people or was he just someone who is along for the ride and helping a little bit but not really cognizant of just what was being conveyed.

MR. PERLMUTTER: Sure, I understand, Judge. Thank you.

THE COURT: There's also the suggestion, although I must say I don't think this one is as important as some of the other ones I've mentioned, that during some of these calls Peralta also tried to recruit victim one to transport narcotics for Peralta after the money would have been repaid.

There is also the allegation that even after these

events were in effect concluded because of Encarnacion's arrest, Peralta continued selling and using marijuana.

I think those are the main ones, including the ones I mentioned earlier.

Now that's all separate from the MDC/MCC issue which is obviously in dispute as well.

MR. PERLMUTTER: I'm sorry. The last thing you said?

THE COURT: Which is also in dispute as well.

MR. PERLMUTTER: Well I guess that from where we sit we're going to need an answer as to that last issue from the government about how they wish to proceed. We'll obviously do whatever the Court --

THE COURT: Let us put aside the MCC/MDC part for a minute. Because if there is going to be a hearing on that, it probably should be a separate hearing and it may not -- I exaggerated when I said two or three weeks but it would probably be several days.

MR. PERLMUTTER: I would imagine we would have to consult with experts.

THE COURT: So let's put that aside for the moment.

So just assuming we're on the other issues that I've just gone over, how long do you want to prepare for such an evidentiary hearing?

MR. PERLMUTTER: I guess in order to understand, to give you that answer, I would need to know how many witnesses

we're talking about from the government. They've obviously said that they would be relying in part on the proffer statement. So that would be the case agent, the statements themselves. I'm aware of one other cooperator. I don't know how many more cooperators they would want to bring in to try to make out these issues. Also, I think we also have the victim's mother testify.

THE COURT: Without committing the government to an exact figure, do you want to give me ballpark?

MS. ELY: Your Honor, one moment?

THE COURT: Yes.

(Pause)

MS. ELY: Your Honor, we would estimate that we would put on the victim, the victim's mother. The case agent will be the same person as who will be testifying about the statements made by Edgar Encarnacion. So that would be not an additional witness but obviously additional proof. Likely one or two cooperating witnesses, though we'll be able to streamline that somewhat. We'll also talk with defense counsel about whether it's possible to streamline somewhat Giglio for one of those cooperating witnesses. I would note that one of the cooperating witnesses has testified at two trials. That there are ways for his testimony to be rather short. It's also possible that he is a lengthy witness. There also may be a few other calls that we would want to put in, including but not

limited to prison calls where the defendant admits that he was the person on --

THE INTERPRETER: I'm sorry.

MS. ELY: Including but not limited to prison calls and the like. So we would need to look into that a little bit further and we can give the Court and defense counsel a slightly better idea.

THE COURT: That's fine. That's the kind of ballpark that I wanted. So let's go back to defense counsel.

MR. PERLMUTTER: Well I guess the question is how soon we could get 3500 material to start preparing.

THE COURT: I'm sure that can be done quite expeditiously. We'll set a date for that after -- before the afternoon is over.

MR. PERLMUTTER: Sure. And then the next question is how quickly -- I would think that we would probably need about two -- (pause) about two or three weeks to get prepped up, Judge.

I'm assuming you're on a short timeframe as well.

THE COURT: Yes. You assume that correctly.

MR. PERLMUTTER: I'm not saying that by reputation I'm saying that because of the time served recommendation.

THE COURT: It is in your client's -- given his very own allegations he doesn't want to be in the MCC/MDC any longer than he has to be, I, therefore, want to give him the speediest

hearing that would be available given the needs of his counsel to prepare.

MR. PERLMUTTER: Understood, Judge.

THE COURT: So, let's say if we're talking about two to three weeks, let's see what we have available.

I think the 9th or 10th of June. The 9th would be better I'm being told.

MS. ELY: Your Honor, would it be possible to do the 10th and a different day as well. I've got long-scheduled grand jury time with lay witnesses on the 9th.

THE COURT: We can move things around so we can do the 10th.

MR. PERLMUTTER: The 10th, Judge?

THE COURT: Yes. Does that work for you?

MR. PERLMUTTER: That's good.

MS. ELY: Should we also book a second day just in case the cooperating witness ends up being the long version rather than the short version?

THE COURT: This, of course, we have to hear from Mr. Cohen as well. Although since his counsel are here, if he doesn't like for I'm sure legitimate reasons any of the dates we work out, then we'll just go forward with the earlier, much earlier dates that we already have and we'll just have to have the same witnesses testify twice. But he might find it more helpful to his own situation to have it later than sooner,

though I'm sure he will be fully prepared under any circumstances.

So, hold on just a minute.

MR. PERLMUTTER: Your Honor, would you maybe want -- we could set two dates now and maybe do a phone conference with Mr. Cohen make sure that we have dates locked in that work for everybody.

THE COURT: Let me tell you what dates are not available to me. In a moment of --

MR. PERLMUTTER: Weakness.

THE COURT: I was -- I couldn't decide whether I preferred the word weakness or stupidity, I agreed to try a civil case in Ocala, Florida, in the height of the rainy season in Ocala, beginning June 16, is it?

THE DEPUTY CLERK: Yes.

MR. PERLMUTTER: I'm sorry to say that my wife is from near Ocala. So I'm going to have to go with the latter suggestion. I apologize.

THE COURT: Anyway, that's going to take as much as two weeks. I hope it will take less but I have to block out two weeks.

MR. PERLMUTTER: If it's two weeks I'm going to stand firm on the latter suggestion then, Judge.

THE COURT: What this means is I really want to do it before June 16.

The other dates that are not available. June 11, 12, and 13 are the Second Circuit judicial conference. I don't think it would be an act of stupidity for me to miss some of that but nevertheless all things being equal I would prefer not to do it on those dates. And the 5th and the 6th of June are also not available because I have to celebrate my 50th college reunion which I would also gladly avoid except I'm the chair of their reunion so probably I should show up. So you can see why we're focusing on the 9th and 10th.

MR. PERLMUTTER: That's fine but I guess counsel's got a problem with the 9th.

MS. ELY: I'll see if I can move things around, be available at least part of the time of the 9th. Our concern is depending on how long that cooperating witness, would be longer than a day.

THE COURT: So let's have a conference call on Tuesday and we will tentatively plan on the 9th and 10th. But government counsel can try to check out things at their end. And Mr. Cohen, this will be a three-way conference with Mr. Cohen, yourself, and the government counsel. And if -- but I think realistically, just so everyone's aware, the alternative, it sounds like -- which I'd be very reluctant to do -- is early July. As near as I can tell, I have nothing scheduled for July 4 so that day is fully available to the Court anyway, for now.

MR. PERLMUTTER: Nothing better to do on July 4 than have a hearing.

THE COURT: I figure with you guys here there would be enough fireworks to keep me entertained.

MR. PERLMUTTER: Judge, we're at your disposal. I know you're very busy. Our summer is lightening up. And as another great jurist of the 20th century, Justice Brandeis, said, "Take care of today's cases today and tomorrow's cases will take care of themselves." So with that said, I expect that if we have to do it tomorrow -- into July, we can get the availability and will be there for your Honor.

THE COURT: I appreciate it. And once again Justice Brandeis has proven himself a very wise man second only, of course, to Benjamin Cardozo of course.

Anything else you want us to take up?

MR. PERLMUTTER: What time do you want us to conference on Tuesday?

THE COURT: That's a good point.

How about noon?

MR. PERLMUTTER: That's fine, Judge. We'll do a phone conference with --

THE COURT: Well I'm only leaving it to one of you, including you, to set up that call. So just figure out how you want to do the phone logistics and then just call in at noon.

MR. PERLMUTTER: That's very good.

THE COURT: And I'll get on the phone with you.

MR. PERLMUTTER: Thank you, your Honor.

THE COURT: Thank you. So this matter is adjourned.

(Adjourned)